

REMARKS

In accordance with the foregoing, the specification and claims 1, 12, 23, 36, and 54 have been amended.

Claims 1-64 are pending and under consideration.

REJECTION UNDER 35 U.S.C. § 103:

In the Office Action, at page 2, claims 1-3 5-9, 11-20, and 22-64 were rejected under 35 U.S.C. § 103 in view of admitted prior art and U.S. Patent No. 5,966,399 to Jiang et al. ("Jiang"). The reasons for the rejection are set forth in the Office Action and therefore not repeated. The rejection is traversed and reconsideration is requested.

Jiang describes a diffractive planar lens element 44 etched into the uppermost surface of the second stack 22 and capable of focusing and/or collimating laser emission 12 without the necessity for an external lens or lens array. See column 6, lines 47-63 of Jiang. Independent claim 1 has been amended to further clarify the presently claimed invention. Accordingly, rather than the diffractive planar lens element 44 of Jiang being "a single convex surface disposed in a window region through which the laser beam is emitted to collimate the laser beam across the entire window region," as recited in independent claim 1, the lens element 44 is etched into the uppermost surface of the second stack 22 of distributed Bragg reflectors, as shown in FIG. 2 of Jiang. FIG. 2 of Jiang clearly shows that the lens element 44 is not a single convex surface. Accordingly, it is respectfully requested that independent claim 1 and related dependent claims be allowed.

Referring to independent claim 6, the Office Action overlooks some of the claimed features recited in this claim. Specifically, the Office Action indicates, "since the combined structure of admitted prior art and Jiang is identical to the claimed device the combined structure satisfies the Fraunhofer diffraction condition as claimed. However, the concept of providing "the window region comprises a maximum width smaller than a size of light generated in the active layer emitted towards the window region, satisfying a Fraunhofer diffraction condition, where the Fraunhofer diffraction condition occurring in the window region is offset by a focusing power of the micro-lens," as recited in independent claim 6 is not broached by either the admitted prior art nor Jiang. Jiang does not teach or suggest that the diffractive planar lens 44 "comprises a maximum width smaller than a size of light generated in the active layer emitted towards the window region, satisfying a Fraunhofer diffraction condition, where the Fraunhofer diffraction

condition occurring in the window region is offset by a focusing power of the micro-lens;" thus, it is unreasonable to conclude that both structures of the micro-lens and the diffractive planar lens 44 are the same. Because neither Jiang nor the admitted prior art provide the claimed features of the window region of independent claim 6, an ordinary person skilled in the art can only conclude that the combined structure of the admitted prior art and Jiang is not the same as that claimed in independent claim 6. Accordingly, it is respectfully requested that independent claim 6 and related dependent claims be allowed.

Referring to independent claim 12, this claim recites, "a micro-lens comprising a single convex surface disposed in a window region through which a laser beam is emitted to collimate the laser beam across the entire window region." Further, independent claim 23 recites, "a micro-lens integrally formed on a laser beam emitting surface of the VCSEL and comprising a single convex surface disposed in a window region through which a light beam is emitted to collimate the light beam across a window region to emit a parallel light beam." The arguments presented above for independent claim 1 supporting the patentability of these claimed features are incorporated herein. Applicants respectfully assert that the admitted prior art and Jiang, individually or combined fail to teach or suggest all the claimed features of independent claims 12 and 23 and, accordingly, it is requested that independent claims 12 and 23 and related dependent claims be allowed.

Independent claim 17 recites, "wherein the window region comprises a maximum width smaller than a size of the light generated in the active layer and emitted towards the window region, satisfying a Fraunhofer diffraction condition, where the Fraunhofer diffraction condition occurring in the window region is offset by a focusing power of the micro-lens." Further, independent claim 54 recites, "wherein the window region comprises a diameter satisfying a Fraunhofer diffraction condition and is defined by the upper electrode and the micro-lens." The arguments presented above for independent claim 6 supporting the patentability of such claimed features in view of the admitted prior art and Jiang are incorporated herein. It is respectfully requested that independent claim 17 and related dependent claims be allowed.

According to the Office Action, without providing any basis from a reference, it is conclusively asserted that for the relationships claimed in claims 2, 7, 13, 18, 39, 40, 51, 57, 61, and 63, "the formula above is well known in the art." However, the MPEP as well as recent case law further supports this requirement of any reliance of Official Notice be specific and detailed as to what is being relied upon and how.

Regarding Official Notice, on remand from the Supreme Court, the Federal Circuit in In re Zurko, 258 F.3d 1379, 59 USPQ2d 1693 (Fed. Cir. 2001), reversed the decision of the Board of Patent Appeals and Interferences ("Board") to uphold a rejection under 35 USC §103 for lack of substantial evidence. Specifically, in Zurko and other recent decisions, the court criticized the USPTO's, both at the Board and Examiner level, reliance on "basic knowledge" or "common sense" to support an obviousness rejection, where there was no evidentiary support in the record for such a finding.

While "official notice" may be relied upon, as noted in MPEP §2144.03, these circumstances should be rare when an application is under final rejection or action under 37 CFR §1.113. Official Notice unsupported by documentary evidence should be only be taken by the Examiner where the facts asserted to be well known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known and only when such facts are of notorious character and serve only to "fill in the gaps" which might exist in the evidentiary showing made by the Examiner to support a particular ground of rejection. **Further, the applicant should be presented with the explicit basis on which the Examiner regards the matter as subject to official notice sufficient to allow the applicant a proper opportunity to challenge that assertion.**

It is improper to merely deem something obvious without any teaching/suggestion, or the taking of Judicial Notice. If the U.S. Patent and Trademark Office wishes to take Judicial Notice that the proposed structural and functional modification is notoriously well known, it is respectfully requested that supporting evidence be provided. **The Federal Circuit has cautioned that an Examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed.** In re Rouffet, 47 USPQ2d 1453, 1458 (Fed. Cir. 1998).

Thus, both the MPEP and recent case law specifically detail that whenever Official Notice is taken, which should be on very rare occasions, the Office Action must provide the explicit support for the reliance on Official Notice "to allow the applicant a proper opportunity to challenge that assertion."

The outstanding Office Action has provided no explicit support of what the purported well-known features encompass or how the determination of those features as being well known has been determined. Rather, the Office Action only cites the admitted prior art and Jiang, without pointing how the claimed features have been determined as being well known.

In view of the foregoing, it is respectfully requested that independent claims 1, 6, 12, 17, 23, and 54 and related dependent claims be allowed.

CONCLUSION:

In accordance with the foregoing, it is respectfully submitted that all outstanding objections and rejections have been overcome and/or rendered moot, and further, that all pending claims patentably distinguish over the prior art. Thus, there being no further outstanding objections or rejections, the application is submitted as being in condition for allowance, which action is earnestly solicited.

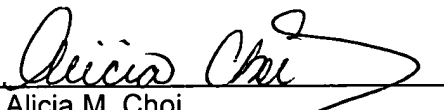
If the Examiner has any remaining issues to be addressed, it is believed that prosecution can be expedited by the Examiner contacting the undersigned attorney for a telephone interview to discuss resolution of such issues.

If there are any underpayments or overpayments of fees associated with the filing of this Amendment, please charge and/or credit the same to our Deposit Account No. 19-3935.

Respectfully submitted,

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